

Legal Fact Sheet

Virginia Food Donations: Liability Protections

Created by the Harvard Law School Food Law and Policy Clinic, April 2024

Businesses (including farms) and nonprofits that donate or distribute donated food are generally well-protected by laws designed to provide immunity from liability related to such donations. The federal Bill Emerson Good Samaritan Food Donation Act provides the basis for liability protection for food donors and nonprofit organizations that distribute donated food.ⁱ In 2022, the Food Donation Improvement Act expanded upon and clarified these protections. Additionally, Virginia state law provides liability protection to food donors and distributors. Consequently, the risk of liability for food donation is very low; research does not turn up a single court case related to food donation liability.

The Bill Emerson Good Samaritan Act

The Bill Emerson Good Samaritan Food Donation Act, as amended by the Food Donation Improvement Actⁱⁱ (together referred to as the Emerson Act), provides a federal baseline of liability protection to encourage food donations to individuals experiencing food insecurity.ⁱⁱⁱ The Emerson Act covers individuals, government entities, schools,^{iv} businesses, nonprofit organizations, and the officers of businesses and nonprofit organizations. It also covers gleaners—individuals that harvest donated agricultural crops for nonprofit organizations that distribute to the needy.^v These individuals and entities are protected so long as the following four requirements are met:

- 1) **Qualifying Foods and Grocery Products:** The donor must donate “apparently wholesome food” or an “apparently fit grocery product” that meets “all quality and labeling standards imposed by Federal, State, and local laws and regulations,” even if the food or grocery product is not “readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”^{vi}
 - **Exception for Reconditioned Items:** Even if a food or grocery product does not meet all applicable standards, donors can still be protected by the Emerson Act if the donor follows all the Act’s reconditioning procedures,^{vii} which include:
 1. The donor informs the nonprofit of the nonconforming nature of the product;
 2. The nonprofit agrees to recondition the item so that it is compliant; and
 3. The nonprofit knows the standards for reconditioning the item.
- 2) **Direct Donations or Donations Through Non-Profits:** Unless the donor is a “qualified direct donor” all donations must be made through a nonprofit organization, such as a food bank or food recovery organization, to needy individuals.^{viii} A “qualified direct donor”

may donate through a nonprofit organization or directly to needy individuals. Organizations that qualify as direct donors are retail grocers; wholesalers; agricultural producers, processors, and distributors; restaurants, caterers, school food authorities, and higher educational institutions.^{ix}

- 3) **Free or Good Samaritan Reduced Price:** When donors donate food or grocery products to a nonprofit organization, the nonprofit must offer the items to needy individuals for free or at a “Good Samaritan Reduced Price,” which is a price not greater than the cost of handling and distributing the items.¹² When a “qualified direct donor” donates directly to individuals, the donation must be provided at no cost.¹³
- 4) **Good Faith:** Donations must be made and distributed in “good faith.”^x While “good faith” is not defined in the Emerson Act, it will likely be satisfied if all other elements of the Act are met, including the donation meeting the requirements for an “apparently wholesome food” or “apparently fit grocery product” and the absence of acts or omissions constituting “gross negligence” or “intentional misconduct.”
 - **Gross Negligence** involves “voluntary and conscious conduct (including a failure to act)” by a person or organization that knew when the donation was made that the donated food was likely to have harmful health impacts.^{xi}
 - **Intentional Misconduct** is when a person or organization donates “with knowledge . . . that the conduct is harmful to the health or well-being of another person.”^{xii}

In other words, one should not donate or facilitate the distribution of donated food that one knows is likely to be harmful or dangerous. The Emerson Act gives little guidance on what activities qualify as gross negligence or intentional misconduct.^{xiii}

So long as these criteria are met, the Emerson Act is quite protective of donors and nonprofit organizations.^{xiv}

Liability Protection for Food Donation in Virginia

In addition to the federal liability protections, there are several ways in which Virginia’s state law is relevant to liability protection for food donations.

- **The Emerson Act:** The Emerson Act indicates that donated food must meet all applicable state and local food quality and labeling standards in addition to federal requirements.^{xv} Therefore, state laws regarding labeling and safety must be followed for a food donor or nonprofit organization to receive protection under the federal Emerson Act.
 - **State Authority:** States are free to enact laws that are more protective of donors and nonprofit organizations than the federal Emerson Act, which sets a floor on liability protection. Virginia passed such legislation.
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Overview of Virginia State Liability Protection Law

Virginia’s food donation liability protection law, which has been in place since 1980 (with subsequent amendments), protects donors from civil liability should the donated food result in injury or death.^{xvi} The law bolsters the liability protections provided in the Emerson Act. Virginia law shields any entity^{xvii} that donates food to a food bank^{xviii} from liability for any injury or death caused by the food’s “nature, age, condition, or packaging.”^{xix} The Virginia law also explicitly states that a food donor or food bank will not be criminally or civilly liable for donating or receiving food past the best-by date or foods with non-safety related flaws so long as the food is labeled to inform recipients that it does not meet all labeling and date requirements.^{xx} This protection does not apply if any injury or death results from gross negligence or intentional misconduct by either the donor or food bank.^{xxi}

Food establishments and restaurants donating excess unserved food to charitable organizations must comply with two additional requirements to be shielded from liability.^{xxii} First, they must comply with Board of Health regulations with regards to preparation, handling, protection, and preservation of food.^{xxiii} Second, prepared foods must be marked with a disposition date, donated before the marked disposition date, and the marked disposition date cannot exceed seven days from the date of preparation.^{xxiv}

Like federal law, Virginia law provides liability protection to farmers who allow gleaners on their land. Farmers are explicitly protected from civil liability if a person is injured or dies while gathering any crops remaining post-harvest, unless the injury or death results from the gross negligence or intentional act of the farmer.^{xxv}

Conclusion

Federal and Virginia state laws provide ample liability protections from both civil and criminal liability for food donors and distributors, so long as the donated food complies with federal and state safety rules and is donated or distributed in good faith and without gross negligence or intentional misconduct. Virginia state law bolsters federal liability protections by providing protection for the distribution of past-date foods and foods with non-safety related flaws so long as the food is labeled to ensure that the recipient is aware that the food does not meet all labeling and date requirements.

ⁱ For more information on the Bill Emerson Good Samaritan Food Donation Act see the Harvard Food Law and Policy Clinic’s Federal Liability Protection for Food Donation Legal Fact Sheet available at <https://chlp.org/wp-content/uploads/2023/03/Emerson-Fact-Sheet.pdf>.

ⁱⁱ Food Donation Improvement Act of 2021, Pub. L. No. 117-362 (extending liability protection to donations offered at a Good Samaritan reduced price—a price that is not more than the cost of handling, transporting, and distributing the food, and to direct donations to needy individuals by certain food businesses—those that are already required to comply with food safety requirements.)

ⁱⁱⁱ 42 U.S.C. § 1791.

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- ^{iv} 42 U.S.C. § 1758 (I)(3) (providing that any “school or local educational agency making donations pursuant to this subsection shall be exempt from civil and criminal liability to the extent provided under section 1791 of this title.”)
- ^v 42 U.S.C. § 1791(c)(I); 42 U.S.C. §1791(b)(5).
- ^{vi} 42 U.S.C. § 1791(c)(I); 42 U.S.C. §1791(c)(4) (Outlining an exception for mislabeled food products that are “not readily marketable,” which can also be protected if the donor explains the mislabeling to the recipient, and the recipient has sufficient knowledge to and does recondition the product to meet applicable standards.)
- ^{vii} 42 U.S.C. § 1791(e).
- ^{viii} The Act defines a non-profit as an incorporated or unincorporated entity that satisfies these requirements: (1) operates “for religious, charitable, or educational purposes” and (2) “does not provide net warnings to, or operate in any other manner for the benefit of any officer, employee, or shareholder.” 42 U.S.C. § 1791(b)(10).
- ^{ix} 42 U.S.C. § 1791(b)(12); Food Donation Improvement Act of 2021, Pub. L. No. 117-362.
- ^x 42 U.S.C. § 1791(c)(1).
- ^{xi} 42 U.S.C. § 1791(b)(8).
- ^{xii} 42 U.S.C. § 1791(b)(9).
- ^{xiii} Legal guide to Food recovery, U. ARK. L.L.M. DEP’T OF AGRIC. & FOOD LAW 10 (2013), available at <https://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>. The House of Representatives Report associated with the Emerson Act has indicated that each case must be analyzed individually, and that, for example, donating food past the sell-by date generally will not impact liability protections because such labeling is not federally required and generally does not correspond to food safety.
- ^{xiv} 42 U.S.C. § 1791(c)(3). Legal guide to Food recovery, U. ARK. L.L.M. DEP’T OF AGRIC. & FOOD LAW 10 (2013), available at <https://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf>.
- ^{xv} 42 U.S.C. § 1791(c); 42 U.S.C. § 1791(b)(1-2).
- ^{xvi} VA. CODE ANN. § 3.2-5144 (2022).
- ^{xvii} The Virginia code defines entity as a farmer, processor, distributor, wholesaler, food service establishment, restaurant, or retailer of food, including a grocery, convenience, or other store selling food or food products. VA. CODE ANN. § 3.2-5144 (A) (2022).
- ^{xviii} The Virginia code defines a protected food organization as a food bank or any Feeding America certified food bank or food bank member charity that is exempt from taxation under § 501(c)(3) of the Internal Revenue Code and maintains a food storage facility certified by the Department and, where required by ordinance, by the State Department of Health. VA. CODE ANN. § 3.2-5144 (A) (2022).
- ^{xix} VA. CODE ANN. § 3.2-5144 (B) (2022).
- ^{xx} VA. CODE ANN. § 3.2-5144 (C) (2022).
- ^{xxi} VA. CODE ANN. § 3.2-5144 (C) (2022).
- ^{xxii} VA. CODE ANN. § 3.2-5144 (2022).
- ^{xxiii} VA. CODE ANN. § 3.2-5144 (B) (2022).
- ^{xxiv} VA. CODE ANN. §§ 3.2-5144 (B); 35.1-14.2 (C); and 10.1-1414 (2022) (defining “prepared food” as “food or beverages prepared for consumption on or off a food vendor’s premises, using any cooking or food preparation technique.”)
- ^{xxv} VA. CODE ANN. § 3.2-5144 (D) (2022) and 42 U.S.C. §1791(d).